FILE COPY

FILED
FEB 17 1959
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 698

EARL R. DEEN,

Petitioner,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

DAVID C. McCORD,
519 Mercantile Bank Building,
Dallas 1, Texas.

JOHNSON, GUTHRIE & STANFIELD,
1410 Republic National Bank Building,
Dallas 1, Texas,
Attorneys for Petitioner.

Of Counsel:
ROBERT LEE GUTHRIE,
1410 Republic National Bank Building,
Dallas 1, Texas.

February 6, 1959.

WARLICK LAW, INC.—1307 HORD STREET—DALLAS—RI 1-8711

SUBJECT INDEX

	Page
Petition for Writ of Certiorari to the Supreme Court of Texas	1
I. Statement of the Matter Involved	2
II. Jurisdiction	5
III. Questions Presented	6
IV. Reasons Relied on for Allowance of the Writ	6
V. Argument Amplifying Reasons Relied on for the Allowance of the Writ	8
VI. Conclusion	19
Appendix:	
Dissenting Opinion of Associate Justice Clyde E. Smith	21
Opinion and Judgment of The Supreme Court of Texas dated November 19, 1958	31
Texas Rules of Civil Procedure, Rules 328, 439 and 440	35

Page

15 Amer. Jur., Sec. 219, p. 641 12

15 Amer. Jur., Sec. 314, p. 620 12

Atlantic Coast Line R. Co. v. Powe (1931), 283 U. S. 401, 51 S. Ct. 498 10

Burchfield v. Tanner (1943), CCA—Tex. 175 S. W. 2d 756 9

Deen v. Gulf, Colorado & Santa Fe Ry. Co., 353 U. S. 925, 77 S. Ct. 715, 1 L. Ed. 2d 721 2

Deen v. Gulf, Colorado & Santa Fe Ry. Co., 275 S. W. 2d 529 2

Deen v. Gulf, Colorado & Santa Fe Ry. Co., 306 S. W. 2d 171 2

Deen v. Gulf, Colorado & Santa Fe Ry. Co., 312 S. W. 2d 933 3

Deen v. Gulf, Colorado & Santa Fe Ry. Co., 317 S. W. 2d 913, 915 ..... 4, 5, 7, 8, 10

Deen v. Hickman, 79 S. Ct. 1, 3 L. Ed. 2d 28 ..... 2, 3, 7, 10

Deen v. Hickman, 79 S. Ct. 111 ..... 3, 10

Dice v. Akron, Canton & Youngstown Ry. Co. (1951), 342 U. S. 359, 72 S. Ct. 312, 315 15

Hamburger v. Kosminsky, CCA-Tex. 61 S. W. 958 18

Neese v. Southern Ry. Co. (1955), 350 U. S. 77, 76 S. Ct. 131 16

Pennell v. Baltimore & O. R. Co., 13 Ill. App. 2d 453, 142 N. E. 2d 497 15

Southern Ry. Co. v. Neese, 216 F. 2d 772 16

Texas Pacific-Missouri Pacific Terminal R. of New Orleans v. Welsh, (1950), (U. S. Ct. of App., 5th Cir.), 179 F. 2d 880, 882 17

Watchtower Mut. Life Ins. Co. v. Davis (CCA-Tex.), 99 S. W. 2d 693 18-19

Page

Statutes Cited

Texas Rules of Civil Procedure, Rules 328, 439, 440 9
Title 28 USCA, sec. 1257, sub-sec. (3) 5
Title 28 USCA, sec. 1651, sub-sec. (a) 6
45 USCA, secs. 51-59 6
45 USCA, sec. 53 ..... 7, 14

In the

Supreme Court of the United States

OCTOBER TERM, 1958

No.....

EARL R. DEEN,

Petitioner,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Earl R. Deen, of Brown County, Texas, petitioner herein, prays that a writ of certiorari be issued to review the final decree of the Honorable Supreme Court of Texas, affirming the judgment of the Honorable Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, reducing the amount of the damages awarded petitioner by the jury and the trial court against the Gulf, Colorado and Santa Fe Railway Company under the Federal Employers Liability Act. This is the third time this case has been

before the Honorable Supreme Court of the United States. (See *Deen v. Gulf, Colorado and Santa Fe R. Co., 353 U.S. 925, 77 S. Ct. 715, 1 L. Ed. 2d 721; Deen v. Hickman, 79 S. Ct. 1, 3 L. Ed. 2d 28.*

I. STATEMENT OF THE MATTER INVOLVED

In *Deen v. Gulf, Colorado and Santa Fe R. Co., 353 U.S. 925, 77 S. Ct. 715, 1 L. Ed. 2d 721,* the Supreme Court of the United States, having held "that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury," reversed the judgment of the Texas Court of Civil Appeals, *275 S. W. 2d 529.* On remand, that Court held that the question of negligence was foreclosed by this Court's decision and affirmed a judgment in favor of petitioner on condition that petitioner accept a remittitur of $5500.00. *306 S. W. 2d 171.* Petitioner accepted the remittitur in the hope of terminating the litigation at that time but reserved the right to complain of such action as depriving him of the right of trial by jury given him under the Federal Employers Liability Act in the event the respondent, Gulf, Colorado and Santa Fe Ry. Co., should prolong the litigation by petition for writ of error, petition for writ of certiorari, motion to certify or otherwise (Paragraph II, Appellee's Motion for Rehearing, certified copy appearing in the Record). Gulf, Colorado & Santa Fe Ry. Co. refused to accept the remittitur, filed Motion for Rehearing (certified copy appears in the Record) and Petition for Writ of Error to The Supreme Court of Texas (certified copy

appears in the Record). Thereafter, Deen filed Petition for Writ of Error to The Supreme Court of Texas complaining that the Court of Civil Appeals had deprived him of the right of trial by jury given him by the Congress under the Federal Employers Liability Act by substituting its finding for that of the jury on damages. (Certified copy of Deen's Petition appears in the Record.)

On review, The Texas Supreme Court, *312 S. W. 2d 933*, affirmed the ruling of the Court of Civil Appeals on the remittitur question, but remanded the cause to the Court of Civil Appeals to determine whether the evidence was sufficient to support the jury's finding of employer negligence, wholly apart from the judgment of the Supreme Court of the United States. From this decision Deen duly perfected a Petition for Writ of Certiorari and a Motion for Leave to File a Petition for Writ of Mandamus. The Motion for Leave to File Petition for Writ of Mandamus was granted *(Deen v. Hickman, ... U. S. ....., 79 S. Ct. 1, 3 L. Ed. 2d 28)*. Because of the granting of the Motion for Leave to File a Petition for Writ of Mandamus, the Petition for Writ of Certiorari was denied *(79 S. Ct. 111, ... U. S. .....)*. Thereafter, on Deen's Motion to Make the Judgment of The Supreme Court of Texas Conform to the Mandate of The Supreme Court of the United States (certified copy of such Motion appears in the Record) The Supreme Court of Texas set aside its judgment remanding the cause to the Court of Civil Appeals of Texas to review the sufficiency of the evidence to support the jury's conclusion of employer negligence but affirmed the [illegible] of the

Court of Civil Appeals in substituting its finding for that of the jury on damages and in requiring a remittitur of $5500.00. *(317 S. W. 2d 913.)* Mr. Justice Smith, Associate Justice, of The Supreme Court of Texas dissented, stating that the judgment of the trial court rendered on the verdict of the jury should be affirmed. *(317 S. W. 2d 915.)* The Supreme Court of Texas rendered judgment in favor of Deen, affirming the judgment of the trial court rendered in accordance with the verdict of the jury, with the exception that the Court reduced the recovery by $5,500.00, the amount of the remittitur required by the Court of Civil Appeals of Texas. (Certified copy of the Judgment of The Supreme Court of Texas appears in the Record.) Deen contends the Texas appellate courts have deprived him of the right of trial by jury three times in the same case. The first two times, on negligence and causation. This time, on damages.

April 8, 1957, the Supreme Court of the United States awarded Deen costs incurred in that Court in the sum of $1294.32. For almost two years, Santa Fe has wrongfully failed and refused to pay those costs, though often requested, and the Texas appellate courts have refused to issue execution therefor, though often requested. On these costs the Texas Court of Civil Appeals at Eastland allowed 6% interest from April 8, 1957 (see certified copy of the Judgment of the Court of Civil Appeals of Texas rendered October 25, 1957, which appears in the Record). Santa Fe made no objection to this ruling in its Motion for Rehearing or otherwise in the Court of Civil Appeals, nor in The

Supreme Court of Texas, nor in the Supreme Court of the United States, when Deen presented Motion for Leave to File Petition for Writ of Mandamus and the Petition for Writ of Certiorari, but complained thereof for the first time in proceedings in The Supreme Court of Texas after Deen's Motion for Leave to File Petition for Writ of Mandamus had been granted. The Supreme Court of Texas declined to pass on this question but reserved it for decision of the Supreme Court of the United States:

> "* * * that the costs incurred in the Supreme Court of the United States, including any recoverable interest thereon, shall be paid exclusively as may be adjudged by that court; * * *." *(317 S. W. 2d 913, 915.)*

Deen complained in Motion for Rehearing of the judgment of The Supreme Court of Texas for the reasons that (1) it deprived him of the right of trial by jury under FELA and (2) it denied him interest on costs, which Santa Fe had refused to pay over a period of almost two years despite the judgment of the Supreme Court of the United States awarding him such costs, and the judgment of the Court of Civil Appeals of Texas allowing interest thereon. (Certified copy of the Motion for Rehearing is in the Record.) The Motion was overruled by The Supreme Court of Texas December 10, 1958. (Certified copy of the Order of The Supreme Court of Texas is enclosed in the Record.)

II. JURISDICTION

1. Jurisdiction to grant this Petition is sustained by *Title 28 U. S. C. A., section 1257, sub-section (3) (June 25, 1948, c. 646, 62 Stat. 929).*

2. The statutes of the United States applied by The Supreme Court of Texas are *45 U. S. C. A., sections 51-59 (35 Stat. 65) as amended; 36 Stat. 291, and 53 Stat. 1404.*

3. Jurisdiction is also sustained by *Title 28 U. S. C. A., section 1651, sub-section (a) (June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, sec. 90, 63 Stat. 102).*

III. QUESTIONS PRESENTED

1. The first question presented is whether The Supreme Court of Texas has deprived Deen of the right of trial by jury given him by the Congress under the Federal Employers Liability Act in affirming the action of the Court of Civil Appeals of Texas in reducing the damages awarded Deen by the jury and the trial court by $5500.00.

2. The second question presented is whether Deen is entitled to interest on costs paid by him in the Supreme Court of the United States, where such costs were awarded him April 8, 1957, interest allowed thereon on remand by the Court of Civil Apepals of Texas, and Santa Fe has failed and refused to pay them.

IV. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The authority of an intermediate appellate state court to substitute its findings on damages for that of the jury and the trial court in an FELA case is the only substantial question that remains undecided in this cause. The

undisputed evidence amply supported the finding of the jury and the trial court. The Texas Court of Civil Appeals says the damages awarded by the jury and the trial court were excessive by $5500.00. The Texas Supreme Court held the excessiveness of the jury's verdict and the judgment of the trial court was properly a matter to be decided by the Court of Civil Appeals of Texas, affirmed this holding, and rendered judgment in favor of Deen for $5500.00 less than that awarded him by the jury and the trial court. Under the provisions of *45 U. S. C. A., sec. 53, Apr. 1908, c. 149, sec. 3, 35 Stat. 66*, the Congress provided that the amount of the damages was a matter for the jury to determine. In substituting its finding for that of the jury on damages the Court of Civil Appeals has deprived Deen of the right of trial by jury on this phase of the case and The Supreme Court of Texas, with Mr. Justice Smith, Associate Justice of that Court, dissenting, has approved this action *(317 S. W. 2d. 913)*.

Since April 8, 1957, Santa Fe has wrongfully withheld from Deen $1294.32 paid by Deen and awarded him by judgment of the Supreme Court of the United States. The Court of Civil Appeals of Texas awarded Deen interest on this amount at the rate of 6% per annum from April 8, 1957 in a judgment rendered October 25, 1957. (Certified copy is in the Record). Santa Fe did not complain of this part of the judgment in its Motion for Rehearing, nor in The Supreme Court of Texas nor in the Supreme Court of the United States prior to the Order made by the Supreme Court of the United States in *Deen v. Hickman, 79*

S. Ct. 1, 3 L. Ed. 2d 28, October 27, 1958. Then for the first time Santa Fe said interest should not be allowed on costs and The Supreme Court of Texas said it was a matter to be passed on by the Supreme Court of the United States *(317 S. W. 2d 913, 915)*. Deen says he is entitled to interest on costs actually paid by him, when the Supreme Court of the United States awarded such costs to him, and Santa Fe has withheld payment thereof for a period of almost two years. Particularly is this true where the Court of Civil Appeals allowed such interest in its judgment dated October 25, 1957 and Santa Fe did not complain thereof in Motion for Rehearing, in The Supreme Court of Texas or in the Supreme Court of the United States until the cause was remanded by the Supreme Court of the United States to The Supreme Court of Texas with directions to make its judgment conform to the judgment of the Supreme Court of the United States.

V. ARGUMENT AMPLIFYING REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. On the first review of this cause, the Supreme Court of the United States did not pass on the question of damages, although that issue had been raised by Santa Fe both in the Court of Civil Appeals of Texas and in the Supreme Court of the United States [Santa Fe's Reply Brief (1957) filed in the Supreme Court of the United States, p. 20]. On remand, the Court of Civil Appeals of Texas passed on the question of damages, found them excessive by $5500.00 and ordered Deen to file a remit-

titur for that amount or else the cause would be reversed for a new trial. (See certified Judgment of Court of Civil Appeals in the Record dated October 25, 1957.) Deen filed the remittitur in the hope of terminating the litigation but reserved the right to complain of the action of the Court of Civil Appeals as depriving him of the right of trial by jury under the FELA, if Santa Fe refused to accept the remittitur and prolonged the litigation. (Certified copies of Deen's Remittitur and Motion for Rehearing appear in the record.) Santa Fe did prolong the litigation by applying to The Supreme Court of Texas for writ of error and thereafter Deen also applied for writ of error to The Supreme Court of Texas on the ground that the Court of Civil Appeals had deprived him of the right of trial by jury on damages contrary to the provisions of FELA. Deen's action in filing a remittitur and then complaining thereof in The Supreme Court of Texas, after Santa Fe refused to accept the judgment of the Court of Civil Appeals, is in accordance with Texas Rules of Civil Procedure, 439, 440 and 328 hereto attached. [See *Burchfield v. Tanner (1948), Court of Civil Appeals of Texas, 175 S. W. 2d 756.*]

The Supreme Court of Texas at that time reversed the judgment of the Court of Civil Appeals and remanded the cause to that court to pass on the sufficiency of the evidence to support the jury's conclusion of employer negligence irrespective of the judgment of the Supreme Court of the United States. At the same time, The Supreme Court of Texas expressed the opinion the remittitur re-

quired by the Court of Civil Appeals was proper. But the holding of The Supreme Court of Texas was obiter dicta. In granting Deen's Motion for Leave to File a Petition for Writ of Mandamus, the Supreme Court of the United States held the question of employer negligence had been foreclosed by the previous decision of the Court but the Court did not pass on the question of the remittitur, required by the Texas Court of Civil Appeals and approved by The Supreme Court of Texas, and on the question of interest on costs raised by Deen in his Petition for Writ of Certiorari filed contemporaneously with his Motion for Leave to File Petition for Writ of Mandamus. *(Deen v. Hickman, 79 S. Ct. 1, 3 L. Ed. 2d 28.)* The denial of Deen's Petition for Writ of Certiorari because of the granting of his Motion for Leave to File Petition for Writ of Mandamus *(79 S. Ct. 111, L. Ed. 2d)* did not indicate an approval by the Supreme Court of the United States of the holding of The Supreme Court of Texas on these questions. [*Atlantic Coast Line R. Co. v. Powe (1931), 283 U. S. 401, 51 S. Ct. 498.*] On remand to The Supreme Court of Texas, after the Supreme Court of the United States had granted the above Motion, Deen again complained of the remittitur but The Supreme Court declined to alter its former ruling on that point, although Mr. Justice Smith thought it should, and the Court refused to consider the interest on costs question at all, saying that was a matter for the Supreme Court of the United States to pass on. *(317 S. W. 2d 913, 915.)*

The ruling of The Supreme Court of Texas on the damages awarded Deen by the jury and the trial court is clearly erroneous. The jury found from a preponderance of the evidence that $39,000.00 would reasonably compensate Deen for his injury, but that this recovery should be reduced by $17,550.00 because of Deen's contributory negligence (R.* 156). These findings were amply supported by the evidence. Deen was 36 years old at the time he sustained his injuries (R. 10). He earned $280.00 to $300.00 a month after deductions (R. 27). Deen's right leg sustained a compounded fracture midway between the knee and the ankle (R. 30, 31). He was in a state of shock and had a lot of pain (R. 30). The undisputed medical evidence showed Deen sustained twenty per cent permanent partial disability (R. 40). Other evidence showed Deen would experience pain in the future, had a permanent lack of sensation in his heel, had a bent knee for weight bearing, could climb ladders only with great difficulty, could no longer dance and that he was crippled and had to walk with a limp. Deen was away from work because of his injuries about ten months, July 12, 1949 to April 3, 1950 (R. 47). Deen's actual loss of earnings amounted to $2350.00 (R. 47). Deen's loss of earning capacity is permanent. The jury and the trial court say the above evidence, and other evidence in the Record not here detailed, including the jury's and trial court's observation of Deen's leg, establishes that $39,000.00 will reasonably compensate Deen for his in-

R* here and hereafter refers to Record filed in *Deen v. Gulf, Colorado & Santa Fe Ry. Co.*, Cause No. 199.

juries, but that his recovery should be reduced $17,550.00 because of his own negligence.

In awarding damages to Deen, the jury and the trial court were entitled to consider the depreciated value of the dollar *(15 Amer. Jur., sec. 314, p. 620)*. When Deen's recovery is compared with recoverties in other cases for similar injuries there is nothing to indicate passion or prejudice on the part of the jury.

15 Amer. Jur., Sec. 219, p. 641.

> "Verdicts up to $50,000.00 for the fracture of both legs may be sustained when taken into consideration with various other pertinent factors in the case, including other injuries received by the plaintiff as a result of the defendant's wrongful act. Similarly, verdicts up to $35,000 for the fracture of one leg, up to $27,000 for the fracture of one or both hips, up to $28,000 for the fracture of a knee, up to $35,000 for the fracture of both ankles, and up to $20,000 for the fracture of one ankle, have been declared not to be so excessive as to justify any interference by the court."

The railway company is hardly in a position to contend that the jury in the *Deen* case was actuated by passion and prejudice. The jury made many findings in favor of the railway company. In fact, the railway company contended in the Supreme Court of the United States that the jury in the *Deen* case rendered a verdict in its favor (Respondent's Reply Brief, p. 75, where this contention is stated by the railway company in italics for emphasis).

The Court of Civil Appeals said:

> "The finding of contributory negligence, which reduced Deen's recovery, did not relieve Appellant of the injurious consequence of the excessive verdict for

> $39,000.00 and the resulting excess judgment based thereon." (Opinion of the Court of Civil Appeals, p. 4, l. 18.)

The Court required a remittitur of $5500.00, and upon this being filed, deducted this amount from the $39,000.00 and rendered judgment for $33,500.00. (Copy of Judgment of the Court of Civil Appeals is in the Record.) The railway company has never complained that the remittitur of $5500.00 was not adequate nor that the evidence did not support the damages found by the jury and the trial court, after such damages had been reduced by the Court of Civil Appeals and such reduction approved by The Supreme Court of Texas. On what basis do the Texas appellate courts say the evidence supports with reason the jury's findings that $33,500.00 will reasonably compensate Deen for his injuries but $39,000.00 is too much? The duration of human life, the permanent loss of partial earning capacity, the humiliation of limping through life, restriction of movement, pain and suffering, and the value of the dollar in 1983, are not subject to exact mathematical calculations. Yet the Texas appellate courts say they are right when they conclude that the evidence on these, and other uncertain factors, establish that $33,500.00 will reasonably compensate Deen for his injuries, but that the trial court and the jury, who actually saw Deen, are wrong when they conclude that the evidence, on these, and other uncertain factors, establish that $39,000.00 will reasonably compensate Deen for his injuries. If the Texas appellate courts are just guessing, why do they guess in favor of the railway company instead of in favor of the injured employee?

The Congress provided in FELA that the jury would determine the damages: "* * * but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; * * *" *(45 U. S. C. A., sec. 53, Apr. 1908, c. 149, sec. 3, 35 Stat. 66)*. Damages are inseparably connected with the cause of action. What will it profit federal employees if the right of trial by jury is protected on negligence and causation, but not on damages?

Mr. Justice Smith of The Supreme Court of Texas in his dissenting opinion expressed the view that the per curiam opinion by the United States Supreme Court rendered October 27, 1958 in *Deen v. Hickman*, supra, foreclosed the question of remittitur against Santa Fe. He was of the opinion the majority had again misconstrued the opinion of the Supreme Court of the United States. He further pointed out that in the Federal Employers Liability Act, Congress had clearly left to the jury the question of damages. Justice Smith says:

> "I think the Act does not contemplate an issue of excessive verdicts or the granting of a remittitur by the trial court or the Court of Civil Appeals. See Neese v. Southern Railway Company, 1955, 350 U. S. 77, 76, S. Ct. 131, 100 L. Ed. 60.
>
> "To allow a remittitur would nullify a material portion of the Act. It, no doubt, was the intention of the Congress to place the power of evaluating evidence solely with the jury. The per curiam opinion unquestionably, although it did not expressly hold, intended to foreclose any action by this Court or the Court of Civil Appeals, except to require that judgment be entered for Deen in accordance with the jury verdict."

Justice Smith quoted at great length in his dissenting opinion from an opinion by the Court of Civil Appeals of Illinois in

Pennell v. Baltimore & O. R. Co., 13 Ill. App. 2d 453, 142 N. E. 2d 497.

where that Court stated the Supreme Court of the United States had indicated that it considered the question of damages to be for the jury under FELA. That the Congress in that Act had not indicated any outer limits of recovery, nor had the Supreme Court of the United States provided any objective criteria against which an intermediate appellate court might weigh the exercise of discretion by the trial court in handling such issue. The Court of Appeals of Illinois concluded excessiveness of the verdict of the jury was strictly one for the trial court.

The able dissenting opinion of Mr. Justice Smith of The Supreme Court of Texas and the opinion of the Court of Civil Appeals of Illinois are amply supported by federal authorities.

Dice v. Akron, Canton & Youngstown R. Co. (1951), 342 U. S. 359, 72 S. Ct. 312, 315.

"We have previously held that 'The right to trial by jury is "a basic and fundamental feature of our part of federal jurisprudence"' and that it is 'part and parcel of the remedy afforded railroad workers under the employers' Liability Act.' Bailey v. Central Vermont R. Co., 319 U. S. 350, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444. We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support the negli-

gence 'is to take away a goodly portion of the relief which Congress has afforded them.' It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has used. Brown v. Western R. Co., 338 U. S. 294, 70 S. Ct. 105, 94 L. Ed. 100.

"The trial judge and the Ohio Supreme Court erred in holding that petitioner's rights were to be determined by Ohio law and in taking away petitioner's verdict when the issues of fraud had been submitted to the jury on conflicting evidence and determined in petitioner's favor. The judgment of the Court of Appeals of Summit County, Ohio, was correct and should not have been reversed by the Supreme Court of Ohio. The cause is reversed and remanded to the Supreme Court of Ohio for further action not inconsistent with this opinion."

Neese v. Southern Railway Company (1955), 350 U. S. 77, 76 S. Ct. 131.

In this case, the Supreme Court of the United States had before it an FELA case, where the trial court found a verdict excessive and ordered a remittitur. The Court of Civil Appeals, *216 F. 2d 772*, found the damages were still excessive in spite of the remittitur and remanded the cause solely for further proceedings on damages. On certiorari, the Supreme Court of the United States reversed the Court of Appeals, saying on the damages question:

"For apart from that question, as we view the evidence, we think that the action of the trial court was not without support in the record and accordingly that its action should not have been disturbed by the Court of Appeals."

Texas Pacific-Missouri Pacific Terminal R. of New Orleans v. Welsh (1950) (United States Court of Appeals, 5th Circuit), 179 F. 2d 880, 882.

"We now reach the question of the excessiveness of the verdict. It is not required that we set out the action that we would have taken had we been the trial Judge because the power and responsibility to deal with the issue of the excessiveness of a jury verdict, according to the decisions of this Court and of the Supreme Court, reside in the trial Judge. See Parsons v. Bedford, Breedlove & Robeson, 3 Pet. 433, 7 L. Ed. 734; New York Central Railroad v. Fraloff, 100 U. S. 24, 25 L. Ed. 531; City of Lincoln v. Power, 151 U. S. 436, 14 S. Ct. 387, 38 L. Ed. 224; Herencia v. Guzman, 219 U. S. 44, 31 S. Ct. 135, 55 L. Ed. 81; Southern Rv.-Carolina Division v. Bennett, 233 U. S. 80, 34 S. Ct. 566, 58 L. Ed. 860; Swift & Co. v. Ellinor, 5 Cir., 101 F. 2d 131; Home Inc. Co. of New York v. Tydal Company, 5 Cir., 157 F. 2d 851; and Railway Express Company v. Cox, 5 Cir., 179 F. 2d 593. The Appellant, in recognition of, but in disagreement with, those decisions as to the limitations placed upon us by the Seventh Amendment, urges that after Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, the ruling that we cannot reverse for excessiveness of the verdict is no longer effective, and that in diversity cases under the Erie case the quantum of damages should be measured by the substantive law of Louisiana as declared by its courts, which places the duty upon its appellate courts to reduce an excessive verdict. We cannot approve this contention in a case arising under a federal statute, as here. The rights and remedies of the parties are not fixed by state law in actions brought under the Federal Employers' Liability Act even though the Act contains no rule by which damages should be measured. Brown v. Western Ry. of Alabama, 338 U. S. 294, 70 S. Ct. 105. Moreover, since the ruling announced in Swift &

Co. v. Ellinor and Home Ins. Co. v. Tydal Company, supra, that this Court has no function to re-examine the amount of the verdict found by a jury is based upon limitations imposed by the Seventh Amendment of the Federal Constitution, the doctrine of Erie Railroad v. Tompkins, supra, could not abrogate, or set at naught, such rule as to require, or to permit us to follow state law on the subject. See Reid v. Nelson, 5 Cir., 154 F. 2d 724.

"From the foregoing it follows that the judgment of the lower Court should be, and the same is hereby, affirmed."

The decisions of the Supreme Court of the United States in FELA cases have not received a friendly reception in the appellate courts of Texas. While numerous decisions of this Court have made it clear that appellate courts must not substitute their findings for that of the jury on negligence and causation, nothing will have been accomplished, if appellate courts are permitted to thwart the will of the jury by controlling damages. Damages are inseparably connected with the cause of action.

2. After remand, Santa Fe refused to pay the costs which Deen had paid in the Supreme Court of the United States in the sum of $1294.32, awarded Deen by the Court, April 8, 1957. The Court of Civil Appeals of Texas awarded Deen interest on this amount at the rate of 6% per annum from April 8, 1957. (Certified copy of the Judgment of the Court of Civil Appeals rendered October 25, 1957 appears in the Record.) This is in accord with local practice. Where a party has paid the costs he is entitled to interest thereon. *(Hamburger v. Kosminsky, Court of Civil Appeals of Texas, 61 S. W. 958, Watchtower Mut. Life Ins. Co. v. Davis,*

Court of Civil Appeals of Texas, 99 S. W. 2d 693.) Santa Fe did not complain in its Motion for Rehearing in that Court, nor in its Petition for Writ of Error to The Supreme Court of Texas, nor in The Supreme Court of Texas, nor in its Reply to Deen's Second Petition for Certiorari, nor in its Reply to Deen's Motion for Leave to File Petition for Writ of Mandamus in this Court to the Court of Civil Appeals allowance of interest on costs already paid by Deen. It was only after the Supreme Court of the United States directed The Supreme Court of Texas to make its judgment conform to the mandate of the Supreme Court of the United States, that Santa Fe complained of the allowance of interest on costs by the Court of Civil Appeals, and The Supreme Court of Texas then ruled for the first time it was a matter for the Supreme Court of the United States to pass on. Deen says the judgment of the Court of Civil Appeals on this point is correct and in any event it had become final long before The Supreme Court of Texas referred it to the Supreme Court of the United States for decision.

WHEREFORE, petitioner prays that a writ of certiorari be granted in order for this Court to review the record, opinion and final judgment of The Supreme Court of Texas in this case, and that on final hearing the cause be remanded to The Supreme Court of Texas with directions to render judgment affirming the judgment of the trial court, and that all costs be taxed against respondent and that petitioner have interest on $1294.32 of such costs at the rate of 6% per annum from April 8, 1957 and peti-

tioner prays for such other and further relief, general and special, at law and in equity to which he may be justly entitled.

Respectfully submitted,

DAVID C. MCCORD,
519 Mercantile Bank Building,
Dallas 1, Texas.

JOHNSON, GUTHRIE & STANFIELD,
1410 Republic National Bank Building,
Dallas 1, Texas,
Attorneys for Petitioner.

Of Counsel:
ROBERT LEE GUTHRIE,
1410 Republic National Bank Building,
Dallas 1, Texas.

February 6, 1959.

I certify that a copy of the foregoing Petition for Writ of Certiorari to The Supreme Court of Texas has been mailed on the 6th day of February, 1959, to the Respondent's attorneys as follows: To Messrs. Wigley, McLeod, Mills and Shirley, attorneys at Law, Union Station Building, Galveston, Texas; to Messrs. Woodruff and Holloway, Attorneys at Law, First National Bank Building, Brownwood, Texas; and to Messrs. Hudson, Keltner and Sarsgard, Attorneys at Law, 1313 Continental Life Building, Fort Worth 2, Texas.

ROBERT LEE GUTHRIE

APPENDIX A

In the

SUPREME COURT OF TEXAS

No. A-6584

GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Petitioner,

v.

EARL R. DEEN,
Respondent.

From Brown County, Eleventh District

By our opinion delivered May 7, 1948 (512 S. W. 2d 933) in this suit under the Federal Employers' Liability Act, we reversed the judgment of the Court of Civil Appeals (306 S. W. 2d 171), which, in reliance upon a judgment of the Supreme Court of the United States in this same cause (353 U. S. 925), had affirmed the judgment of the trial court in favor of the plaintiff Deen conditioned upon remittitur by him of $5500.00. The cause was remanded by us to the Court of Civil Appeals "with directions—to adjudicate, upon its own independent evaluation of the evidence, and wholly apart from the judgment of the Supreme Court of the United States, whether or not the jury finding of negligence of the defendant—is so against the

weight and preponderance of the evidence as to require a new trial in the interest of justice and, upon the basis of its said adjudication, to either affirm the judgment of the trial court or grant a new trial." This action was taken at the behest of the defendant Railway Company as petitioner in this Court:

In the same proceeding we denied the plaintiff Deen, who was also a petitioner, any relief against the above-mentioned action of the Court of Civil Appeals in requiring a remittitur as a condition of the affirmance of the trial court judgment.

From our judgment the plaintiff Deen sought relief in the Supreme Court of the United States by (1) mandamus "requiring the Supreme Court of Texas to vacate its judgment rendered on May 7, 1958, in this cause and requiring the said the Supreme Court of Texas to render a judgment and decree sustaining and affirming the judgment of the trial court rendered April 12, 1954, subject to a remittitur in the sum of $5500.00, but without prejudice to Deen's right to seek review of such remittitur—by Petition for Writ of Certiorari—," and (2) writ of certiorari to review our mentioned judgment in all respects in which it was unfavorable to the plaintiff Deen, including our rejection of his complaint against the requirement of remitttitur by the Court of Civil Appeals. In the Supreme Court of the United States the mandamus proceeding was given the number 113 Misc., and the certiorari proceeding number 187, October Term, 1958.

Under date of October 27, 1958, the relief sought by mandamus was in effect granted, as evidenced by the Court's per curiam opinion of that date,[1] and the relief by certiorari denied by order of the same date which stated the denial to be "in view of the order entered this day in Deen v. Hickman, No. 133, Misc., October Term, 1958."

Pursuant to the action of the Supreme Court of the United States in the mandamus proceedings, it is our duty to withdraw our previous judgment and render a new decision conformably to the decision of that Court. Our above-mentioned decision and judgment of May 7, 1958, are accordingly revoked, except in so far as they refused to disturb the action of the Court of Civil Appeals in requiring the remittitur; and judgment is now rendered in favor of the plaintiff, subject to said remittitur, all as more fully hereinafter provided.

---

[1] "No. 133 Misc. DEEN v. HICKMAN

"Per Curiam: In *Deen* v. *Gulf, Colorado & Santa Fe R. Co.*, 353 U. S. 925, this Court, having held 'that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury,' reversed the judgment of the Texas Court of Civil Appeals. On remand, that court held that the question of negligence was foreclosed by this Court's decision and affirmed a judgment in favor of the petitioner on condition that petitioner accept a remittitur. On review, the Texas Supreme Court remanded the case to the Court of Civil Appeals 'with directions * * * to adjudicate, upon its own independent evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the United States, whether or not the jury finding of negligence of the defendant * * * is so against the weight and preponderance of the evidence as to require a new trial in the interest of justice, and, upon the basis of its said adjudication, to either affirm the judgment of the trial court or grant a new trial.' The determination of that issue was foreclosed by *Deen* v. *Gulf, Colorado & Santa Fe R. Co.*, supra. The motion for leave to file a petition requesting this Court to mandamus the Texas Supreme Court to conform its decision to our mandate in that case is granted. Assuming as we do that the Supreme Court of Texas will of course conform to the disposition we now make, we do not issue the writ of mandamus.

Mr. Justice Stewart took no part in the consideration or decision of this case.

October 27, 1958."

By motion, the plaintiff prays that we not only affirm the latter judgment in respect to its having upheld a recovery in his favor, but also modify said judgment to the extent of eliminating the remittitur therein required. As to this, it is enough to say that, since we have heretofore decided, as above stated, that the Court of Civil Appeals had the power to require the remittitur, and since the above described action of the Supreme Court of the United States conspicuously forbears to disturb this part of our decision, but, on the contrary, denies the writ of certiorari wherein the plaintiff sought to review it, we must decline to reconsider the question on its merits.

It is therefore ordered that the plaintiff Earl R. Deen do have and recover of the defendant, Gulf, Colorado & Santa Fe Railway Company and the sureties on its supersedeas bond, to-wit, T. W. Lain and R. K. Hutchings, jointly and severally, the principal sum of $15,950.00, with interest thereon at the rate of 6% per annum from the date of the trial court judgment, to-wit, April 12, 1954, until paid; further ordered that out of said recovery and as a credit against the same, there shall be paid by the defendant to the Railroad Retirement Board the sum of $650.00, being the amount of a loan from said Board to the plaintiff, payable out of said recovery by agreement between the plaintiff and the defendant; further ordered that the costs of this litigation in the state courts shall be paid as follows: The costs incurred in the Court of Civil Appeals through the entry of the first judgment rendered by that court shall be paid by the plaintiff; and all other costs, including those

incurred in the trial court, shall be paid by the defendant; such allocation of costs being substantially the same as would have been made if the Court of Civil Appeals had in the first instance rendered the judgment which has now become the final judgment in this cause; that no interest on said costs shall be recovered by either party; that the costs incurred in the Supreme Court of the United States, including any recoverable interest thereon, shall be paid exclusively as may be adjudged by the Court; and that as to state court costs recoverable hereunder by the defendant, the defendant is denied the right to offset the same against costs incurred by it in the Supreme Court of the United States, except as the latter Court may otherwise order.

W. St. John Garwood
Associate Justice

WSJG/p
Associate Justice Smith dissenting
Opinion delivered:
November 19, 1958.

APPENDIX A—(Continued)

No. A-6584

In the

SUPREME COURT OF TEXAS

GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Petitioner,

v.

EARL R. DEEN,
Respondent.

From Brown County, Eleventh District

DISSENTING OPINION

I respectfully dissent. The per curiam opinion by the United States Supreme Court rendered on October 27, 1958, conclusively forecloses the question of remittitur against the petitioner. The majority seems to attach considerable significance to the action of the Supreme Court in denying relief by certiorari. I think the majority has again misconstrued the opinion of the Supreme Court just as this Court misconstrued the opinion in Deen v. Gulf, Colorado & Santa Fe R. Co., 353 U. S. 925. The majority still overlooks the fact that this is a case brought under the Federal Employers Liability Act. The Congress provided by the

adoption of such Act that the jury would determine the damages. The Act provides for what we commonly call comparative negligence. In other words, the Act provides that in assessing the damages in the event of negligence, etc., on the part of the defendant, the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee. See 45 U. S. C. A., Sec. 53, Apr. 1908, c. 149, Sec. 3, 35 Stat. 66.

I think the Act does not contemplate an issue of excessive verdicts or the granting of a remittitur by the trial court or the Court of Civil Appeals. See Neese v. Southern Railway Company (1955), 350 U. S. 77, 6 S. Ct. 181.

To allow a remittitur would nullify a material portion of the Act. It, no doubt, was the intention of the Congress to place the power of evaluating evidence solely with the jury. The per curiam opinion unquestionably, although it did not expressly hold, intended to foreclose any action by this Court or the Court of Civil Appeals, except to require that judgment be entered for Deen in accordance with the jury verdict. The opinion expressly reverses the action of this Court wherein the case was remanded to the Court of Civil Appeals with directions to adjudicate, upon its own independent evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the United States, whether or not the jury finding of negligence of the defendant is so against the weight and preponderance of the evidence as to require a new trial in the interest of justice, and, upon the basis of its adjudication, to either affirm the

judgment of the trial court or grant a new trial. I am now convinced that all issues have been forclosed and that this litigation should come to an end. The matter can be expedited by following what seems to me to have been the clear intent of the United States Supreme Court. See Pennell v. B. & O. R. R. Co., 13 Ill. App. 2d 433, 142 N. E. 2d 497. To consider the question of remittitur necessarily would require evaluating evidence and reviewing the weight of the evidence. The last cited case dealt with the problem, and, in holding against the contention of the petitioner in the instant case, said, in part:

> "To consider this issue would necessarily require reviewing the weight of the evidence since it is obvious there is an evidentiary basis for a substantial verdict. The recent case of Nesse v. Southern Railway Company, 350 U. S. 77, 76 S. Ct. 131, 100 L. Ed. 60, lends support to this view. In that case, the Court of Appeals determined in a carefully considered and actuarially supported opinion that the verdict was excessive. The Supreme Court in a per curiam opinion, simply concluded that the record supported the jury's verdict and reversed the Court of Civil Appeals. While there was no clarifying of the scope of review of the issue of excessiveness of the verdict in intermediate appellate courts, the result reached indicates in view of the Supreme Court on that issue. In addition, our examination of the cases reaching the U. S. Supreme Court touching on the issue of excessiveness of the verdict reveals no objective criteria against which an intermediate appellate court might weigh the exercise of discretion by the trial court in handling such issue. Nor has the Congress defined the outer limits of recovery in such cases. Therefore, in the light of the Harsh case, and in the absence of any approved standards or criteria by which a verdict may be adjudged

either reasonable or excessive or so large as to indicate prejudice of the jury, this court cannot determine the trial court's treatment of this issue to be erroneous."

I would affirm the judgment of the trial court.

Clyde E. Smith
Associate Justice

CES:os

Nov. 19, 1958

APPENDIX B

In the

SUPREME COURT OF TEXAS

No. A-6584

GULF, COLORADO & SANTA FE RAILWAY COMPANY

v.

EARL R. DEEN

November 19, 1958

From Brown County, Eleventh District.

This cause again came on to be heard on mandate from the Supreme Court of the United States, consequent upon the judgments of that Court dated October 27, 1958, in the mandamus proceeding entitled Earl R. Deen *v.* Honorable J. E. Hickman, et al., No. 133 Miscellaneous, October Term, 1958, and the writ of certiorari proceeding entitled Earl R. Deen v. Gulf, Colorado and Santa Fe Railway Co., No. 187, October Term, 1958, and on motion of respondent-petitioner, Earl R. Deen, to enter judgment making the judgment of the Supreme Court of Texas conform to the

mandate of the Supreme Court of the United States, and these, together with the record having been duly considered, it is ordered that the motion to enter judgment to conform to the mandate of the Supreme Court of the United States be, and hereby is, in part granted and in part overruled, as hereinafter more fully appears.

And because it is the opinion of the Court that, pursuant to the action of the Supreme Court of the United States in the said mandamus proceeding and writ of certiorari proceeding, the judgment as entered in the minutes of this Court under date of May 7, 1958, should be revoked, and in lieu thereof judgment should be entered affirming judgment of the Court of Civil Appeals dated October 25, 1957, it is therefore *ordered, adjudged* and *decreed* that the judgment of this Court of May 7, 1958, be, and hereby is, set aside, and that the judgment of the Court of Civil Appeals of October 25, 1957, be, and hereby is, affirmed, and that accordingly judgment is hereby rendered as follows- to-wit:

It is *considered, adjudged, ordered* and *decreed* that the plaintiff, Earl R. Deen, do have and recover of and from the defendant, Gulf, Colorado and Santa Fe Railway Company, and the sureties on its supersedeas bond, T. W. Lain and R. K. Hutchings, jointly and severally, the principal sum of $15,960.00, with interest thereon at the rate of 6% per annum from April 12, 1954, the date of the trial court judgment, until paid; that out of said recovery and as a credit against the same, the defendant, Gulf, Colorado and Santa Fe Railway Company, shall pay to the Railroad Retirement Board the sum of $650.00, being the amount of a

loan from said Board to the plaintiff, payable out of said recovery by agreement between the plaintiff and the defendant; that the costs of this litigation in the state courts shall be paid as follows: the costs incurred in the Court of Civil Appeals through the entry of the first judgment rendered by that Court on February 4, 1955, shall be paid by the plaintiff, Earl R. Deen, and all other costs, including those incurred in the trial court, shall be paid by the defendant, Gulf, Colorado and Santa Fe Railway Company; that no interest on said costs shall be recovered by either party; that the costs incurred in the Supreme Court of the United States, including any recoverable interest thereon, shall be paid exclusively as may be adjudged by that Court; and that as to state court costs recoverable hereunder by the defendant, the defendant is denied the right to offset the same against costs incurred by it in the Supreme Court of the United States, except as that Court may otherwise order, all in accordance with the opinion herein this day delivered.

It is further ordered that this decision, with a copy of the opinion, be certified to the District Court of Brown County, Texas, for observance.

APPENDIX C

Texas Rules of Civil Procedure

RULE 328 IF NOT EQUITABLE

New trials may be granted when the damages are manifestly too small or too large, provided that whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal in said action, then the party remitting shall not be barred from contending in the appellate court that said remittitur should not have been required either in whole or in part, and if the appellate court sustains such contention it shall render such judgment as the trial court should have rendered without respect to the remittitur

Source: Art. 2235. Change: Addition of all wording after the first comma.

RULE 439 REMITTITUR

If, in any judgment rendered in the district or county court, there shall be an excess of damages allowed, and before the plaintiff has entered a release of same in such court, in the manner provided by these rules, such judgment shall be removed to the Court of Civil Appeals, it shall be lawful for the party in whose favor such excess of damages has been rendered to make such remittitur in the Court of Civil Appeals in the same manner as such release is required to be made in the district or county court. Upon such release being filed in said court, after revising said judgment, said Court of Civil Appeals shall proceed to give

such judgment as the court below ought to have given if the release had been filed therein.

Source: Art. 1861, unchanged.

RULE 440 SUGGESTION OF REMITTITUR

In civil cases appealed to the Court of Civil Appeals, if such court is of the opinion that the verdict and judgment of the trial court is excessive and that said cause should be reversed for that reason only, then said appellate court shall indicate to such party, or his attorney, within what time he may file a remitttitur of such excess. If such remitttitur is so filed, then the court shall reform and affirm such judgment in accordance therewith; if not filed as indicated then the judgment shall be reversed.

Source: Art. 1862, with minor textual change.

FILE COPY

Office-Sup
F

RESPONDENT'S REPLY TO PETITION FOR CERTIORARI

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 7 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 698

EARL R. DEEN, *Petitioner*

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent*

RESPONDENT'S REPLY TO PETITION FOR CERTIORARI

HUDSON, KELTNER & SARSGARD
1313 Continental Life Building
Fort Worth 2, Texas

McLEOD, MILLS, SHIRLEY & ALEXANDER
801 Santa Fe Building
Galveston, Texas
Attorneys for Respondent

Of Counsel:
LUTHER HUDSON
1313 Continental Life Building
Fort Worth 2, Texas

Fort Worth Brief Printing Co., 610 So. Jennings Phone ED 2-4070

INDEX

	Page
Statement of the Case	1
Jurisdiction	6
Questions Presented by Deen's Petition	7
Questions Presented by the Santa Fe	7
Questions Presented if Certiorari Is Granted	7
Argument	8
This Petition Is a Motion for Rehearing	8
Remittitur	10
The Remittitur Required by the Court of Civil Appeals Was Supported by the Record	20
Court Costs	28
Summary	30
Jurisdiction	30
Argument	30
Conclusion	33
Signature and Address of Counsel	33
Certificate	33
Appendix (Texas Rules of Civil Procedure, Rules 328, 439 and 440)	34

AUTHORITIES

Page

A

16 A. L. R. (2) 3 27
46 A. L. R. 1244 27
102 A. L. R. 1143 27
15 Am. Jur. 636 27
American Construction Co. vs. Jacksonville T.K.W. R. Co., 13 S.Ct. 758, 148 U.S. 372, 37 L.Ed. 486 6
Arkansas Valley L. & C. Co. vs. Mann, 130 U.S. 69, 9 S.Ct. 458, 32 L.Ed. 854 10

B

Beaumont, S.L. & W. Ry. Co. vs. Schmidt, 123 Tex. 580, 72 S.W. 2d 899 18

D

Dallas vs. Hutchins (N.R.E.) 226 S.W. 2d 155 27
Davis vs. Buck Stove Co. (Mo.) 49 S.W. 2d 47 27-28
Deen vs. G.C. & S.F. Ry. Co., 358 U.S. 925, 77 S.Ct. 715, 1 L.Ed. 2d 718 ..... 2, 7, 20, 22, 28, 30, 32
Deen vs. G.C. & S.F. Ry. Co. ..... U.S. ....., 3 L.Ed. 2d 105, 77 S.Ct. 111 ..... 4, 5, 8, 29, 30
Deen vs. Hickman, ... U.S. ....., 79 S.Ct. 1, 3 L.Ed. 2d 28 ..... 3, 4, 5, 8, 28
Doroszka vs. Lavine, 111 Conn. 575, 150 A. 692 18

F

Fairmount Glass Works vs. Cub Fork Coal Co., 287 U.S. 474, 77 L.Ed. 439, 53 S.Ct. 252 16
Fidelity U.L. Ins. Co. vs. McGinnis (Civ. App.) 62 S.W. 2d 186 27
Ford Motor Co. vs. Maddin, 124 Tex. 131, 76 S.W. 2d 474 18

G

Gackstetter vs. M. S. R. Co. (Cal.) 52 P. (2) 998 28
G.C. & S.F. Ry. Co. vs. Deen, 275 S.W. 2d 529 2
G.C. & S.F. Ry. Co. vs. Deen, 306 S.W. 2d 171 ..... 2, 20

AUTHORITIES—(Continued)

Page

G.C. & S.F. Ry. Co. vs. Deen, 312 S.W. 2d 933 ..... 2, 8
G.C. & S.F. Ry. Co. vs. Deen, 317 S.W. 2d 913 ..... 4, 8, 12
G.H. & S.A. Ry. Co. vs. Leifeste (Com. App.)
22 S.W. 2d 1061 18

H

Hartford Life Ins. Co. vs. Baker, 127 Okla. 166, 260 P. 6 18
Herencia vs. Guzman, 219 U.S. 44, 55 L.Ed. 81,
31 S.Ct. Rep. 135 10
Hurst vs. C.B. & Q. R. Co., 280 Mo. 566,
219 S.W. 566 19

I

I. & G.N. R. Co. vs. Goswick, 98 Tex. 477, 85 S.W. 785 18
Irvine vs. Gibson, 117 Ky. 306, 77 S.W. 1106 19

J

Janes vs. Busby (Tex. Civ. App.) 93 S.W. 2d 788 29

K

K. C. S. Ry. Co. vs. Diggs (Ark.) 167 S.W. 2d 879 27
Kansas City, Southern R. Co. vs. Mixon-McClintock,
107 Ark. 48, 154 S.W. 205 18
Knock vs. T. & G. Ry. Co., 38 Nev. 143, 145 P. 939 19

L

L. & N.R. Co. vs. Holloway, 246 U.S. 525, 529,
62 L.Ed. 867, 870, 38 S.Ct. 379, 381 10
LaPosta vs. Hummers (Pa.) 55 Atlantic (2) 751) 27
Lewisburg & N. R. Co. vs. Hinds, 134 Tenn, 293,
183 S.W. 985 19
Lonergran vs. Small, 81 Kan. 48, 105 P. 27 18

M

Mimms vs. Bennett, 160 S.C. 339, 150 S.E. 124 19
Morris vs. Atlas Portland Cement Co. (Mo.)
19 S.W. 2d 865 28

AUTHORITIES—(Continued)

Page

N

N. Y. Central and Hudson River R. Co. vs. Fraloff, 100 U.S. 24, 32, 25 L.Ed. 531, 534 10
New York L.E. & W. R. Co. vs. Winter, 143 U.S. 60, 75, 36 L.Ed. 71, 80, 12 S.Ct. Rep. 356 10
Neese vs. Southern Ry. Co., 350 U.S. 77, 76, S.Ct. 131, 100 L.Ed. 60 (Circuit Court, 216 F. 2d 772) 11, 12, 13, 14, 15, 16, 17, 19, 20

P

Pennell vs. B. & O. R. Co., 142 N.E. 2d 497 13
Peoples Bank vs. Aetna Ins. Co., 76 F. 548 29

R

Rathbun vs. Globe Indemnity Co., 107 Neb. ....., 184 N.W. 903 18

S

S.L. I.M. & S. Ry. Co. vs. J. T. Craft, 237 U.S. 648, 661, 59 L.Ed. 1160, 1165, 35 S.Ct. 704 ..... 10, 11
Sawyer vs. Rumford Falls Paper Co., 90 Me. 354, 38 A. 318 18
Simoneau vs. Pacific Electric Co., 166 Cal. 264, 136 P. 544 18
Southern Ry. vs. Bennett, 233 U.S. 80, 58 L.Ed. 860, 34 S.Ct. 566 10

T

T. & P. Ry. Co. vs. Hill, 237 U.S. 208, 59 L.Ed. 918, 35 S.Ct. 575 10
Texas Pacific-Missouri Pacific vs. Welsh (Fifth Circuit) 179 F. 2d 880 16
Texas Pipe Line Co. vs. Hunt, 149 Tex. 33, 228 S.W. 2d 151 18
Texas Rules of Civil Procedure 149, 328, 436, 439, 440, 447, 502 and 511 ..... 17, 29

AUTHORITIES—(Continued)

Page

Tri-County Electric Coop. vs. Clair (N.R.E.) 217 S.W. 2d 681 27

U

28 U.S.C.A. Section 1257 Sub-Section 3 6
28 U.S.C.A. Section 1651 Sub-Section (a) 6
45 U.S.C.A. Sections 51-59 6

V

Vanlom vs. Schneiderman (Ore.), 210 P. 2d 461 19

W

Wilson vs. Freeman, 108 Tex. 121, 185 S.W. 993 18

Y

Y. & M. Valley R. Co. vs. Scott, 108 Miss. 871, 67 So. 491 19
Yergy vs. Helena Light & R. Co., 39 Mont. 213, 102 P. 310 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No. 698

EARL R. DEEN, *Petitioner*

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent*

RESPONDENT'S REPLY TO PETITION FOR CERTIORARI

To The Honorable The Chief Justice and The Associate Justices Of The Supreme Court Of The United States:

Gulf, Colorado and Santa Fe Railway, respondent herein, prays that the petition for certiorari be dismissed, or in the alternative that it be denied. Respondent denies jurisdiction and denies error, and in support of such contentions presents the following:

STATEMENT OF THE CASE

This is the fourth time this case has been before the Supreme Court of the United States. It has been before the Texas Court of Civil Appeals at Eastland twice and before the Supreme Court of Texas twice. Listing these chronologically and briefly summarizing the holding in each, they are:

1. *Gulf, Colorado and Santa Fe Ry. vs. Deen* (11th Court of Civil Appeals) 275 S.W. 2d 529, which held that as the Texas court construed the Texas jury verdict it required the entry of a judgment in favor of the defendant to the effect that Deen took nothing. The Supreme Court of Texas denied writ of error in this case.

2. *Deen vs. Gulf, Colorado and Santa Fe Ry. Co.*, 353 U.S. 925, 77 S. Ct. 715, 1 L. Ed. 2d 718, which is a per curiam opinion (No. 199, October Term, 1956) in which, by a majority of five to four, the Supreme Court held: "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury." The judgment of the Court of Civil Appeals was reversed and remanded to that court.

3. *Gulf, Colorado and Santa Fe vs. Deen* (11th Court of Civil Appeals) 306 S.W. 2d 171. In that opinion the Court of Civil Appeals at Eastland refused to consider the Santa Fe's contention that the jury's finding on negligence was against the overwhelming weight and preponderance of the evidence, but did consider, as authorized by the Texas Rules of Civil Procedure, the Santa Fe's contention that the jury verdict was excessive and entered an order which gave the plaintiff Deen the option of filing a remittitur of $5,500.00 or of having the cause remanded to the trial court for a new trial. Deen filed the remittitur.

4. *Gulf, Colorado and Santa Fe vs. Deen* (Texas Supreme Court) 312 S.W. 2d 933, in which case the Supreme Court of Texas, having granted the applica-

tion for writ of error by both Deen and the Santa Fe, held that the opinion of the Supreme Court of the United States did not preclude the Court of Civil Appeals from considering the question of whether the finding of negligence on the part of the railroad was so against the overwhelming weight and preponderance of the evidence that a new trial was required to prevent manifest injustice. It also held, in response to Deen's contention, that the decision of the Supreme Court of the United States did not preclude the Court of Civil Appeals from passing on the question of excessiveness under the Texas procedure.

5. *Deen vs. Hickman* (Chief Justice, Texas Supreme Court) ..... U.S. ....., 79 S. Ct. 1, 3 L. Ed. 2d 28 (this is No. 133-Miscellaneous, October Term, 1958). That was a suit to mandamus the Supreme Court of Texas (with the attendant motion for leave to file such petition for mandamus) "requiring The Supreme Court of Texas to vacate its judgment rendered on May 7, 1958 in this cause and requiring the said The Supreme Court of Texas to render a judgment and decree sustaining and affirming the judgment of the trial court rendered April 12, 1954 subject to a remittitur in the sum of $5,500.00," etc. The Supreme Court of the United States in another per curiam opinion quoted the Texas opinion "whether or not the jury finding of negligence of the defendant . . . is so against the weight and preponderance of the evidence as to require a new trial in the interest of justice" and said, "The determination of that issue was foreclosed by *Deen v. Gulf, Colorado & Santa Fe R. Co.*, supra." The motion for leave to file the petition for mandamus

MICROCARD
TRADE MARK ®
22
MATTHEW BENDER & COMPANY
MB
8-5-58
CD881
microcard

was granted, but on the assumption that the Supreme Court of Texas would conform, no writ was issued. That was dated October 27, 1958.

6. *Deen vs. Gulf, Colorado and Santa Fe Ry. Co.*, ...U.S. ....., 3 L. Ed. 2d 105, 77 S. Ct. 111. That decision was also October 27, 1958, and is in No. 187, October Term, 1958. That was an application for writ of certiorari by Deen from the decision of the Supreme Court of Texas (312 S.W. 2d 933), in which the second question presented is exactly the same as the second question presented in the current petition for writ of certiorari, that is, the question of interest on costs, and the third question presented in No. 187 is identical with the first question presented in the current petition for certiorari, to-wit, the question of the right of the Court of Civil Appeals under Texas practice to require a remittitur. As indicated, The Supreme Court of the United States on October 27, 1958, denied certiorari.

7. *Gulf, Colorado and Santa Fe Ry. Co. vs. Deen* (Supreme Court of Texas) 317 S.W. 2d 913, in which, after the decision of the Supreme Court of the United States in No. 133-Miscellaneous, *Deen vs. Hickman*, the contention was made by the plaintiff (Deen) that the decision in No. 133-Miscellaneous held that the Court of Civil Appeals had no jurisdiction to require a remittitur. The Supreme Court of Texas in that opinion conformed to the per curiam opinion in *Deen vs. Hickman*, supra, set aside its former judgment and order, and conformed also with Deen's prayer contained in his petition for mandamus (*Deen vs. Hick-*

man) heretofore quoted, and affirmed the judgment of the trial court subject to the $5,500.00 remittitur required by the Court of Civil Appeals, and further, in accordance with Deen's prayer, apportioned the court costs, adjudging the costs on the first appeal to the Court of Civil Appeals against Deen and all other costs, including those incurred in the trial court, against the defendant. No interest was allowed to either party, and the costs in the Supreme Court were left in accordance with the judgment of the Supreme Court of the United States.

8. The current application by Deen for certiorari, again raising the question of interest on his court costs and the question of the right of the court of Civil Appeals, under Texas Rules of Civil Procedure, to require a remittitur.

It should be further stated that neither Deen nor the Santa Fe filed a motion for rehearing in the United States Supreme Court in any of the three prior cases in this court. That is, no motion for rehearing was filed in the original appeal (No. 2 above), nor was any filed by either party in *Deen vs. Hickman* or *Deen vs. G.C. & S.F.*, both decided October 27, 1958.

JURISDICTION

Jurisdiction is denied. It is, of course, admitted that this action was brought under the Federal Employers' Liability Act (45 *U.S.C.A.*, Sections 51-59) by a railway employee engaged in interstate commerce against an employer engaged in interstate commerce. That admission does not create jurisdiction nor alone furnish grounds for this Court exercising its discretion in granting certiorari. There is no statute or rule of this Court which is peculiarly applicable to an FELA case. Deen points to no such statute or rule giving this Court additional jurisdiction or additional discretion in this type of case.

Insofar as petitioner seeks to bottom jurisdiction on 28 *U.S.C.A.*, Section 1257, Sub-Section 3, authorities are collected under the heading "Argument".

Insofar as petitioner seeks to bottom jurisdiction on 28 *U.S.C.A.*, Section 1651, Sub-Section (a), it is sufficient to point out that this section does not authorize certiorari to a state court. Certiorari to state courts is covered by Section 1257, which was the statute passed pursuant to the Constitution, Article III, Section 2. *American Construction Co. vs. Jacksonville T.K.W. R. Co.*, 13 S.Ct. 758, 148 U.S. 372, 37 L. Ed. 486.

QUESTIONS PRESENTED BY DEEN'S PETITION

1. Whether the Texas Court of Civil Appeals (which by Texas rule and statute had the same jurisdiction to do so as the trial court) erred in requiring a remittitur.

2. Whether the Supreme Court of Texas erred in refusing to add to or subtract from the judgment of the United State Supreme Court dated April 8, 1957, allowing Deen costs in this cause.

QUESTIONS PRESENTED BY THE SANTA FE

A. Jurisdiction, as above outlined.

B. Whether the reduction of a jury verdict in an FELA case by the trial judge or by an appellate court which has exactly the same authority (by state statute or rule) as the trial court, is a denial of "trial by jury as provided by the Federal Employers' Liability Act."

C. Whether the action of the Court of Civil Appeals in requiring a remittitur was without support in the record.

QUESTIONS PRESENTED IF CERTIORARI IS GRANTED

1. All points presented by petitioner and respondent in No. 199, *Deen vs. Gulf, Colorado and Santa Fe*, October Term 1955, 353 U.S. 925, 77 S.Ct. 715, 1 L.Ed. 2d 718.

2. All points presented by petitioner and respondent in *Deen vs. Hickman*, October Term, 1958, No. 133-Miscellaneous, ... U.S. ....., 79 S.Ct. 1, 3 L.Ed. 28.

3. All points presented in *Deen vs. Gulf, Colorado and Santa Fe*, ..., U.S. .....; 3 L. Ed. 2d 105, 77 S.Ct. 111 (No. 187, October Term, 1958).

4. All points presented by the Gulf, Colorado and Santa Fe in the Supreme Court of Texas in the cause from which the present petition for certiorari is granted (312 S.W. 2d 933 and 317 S.W. 2d 913).

These are inserted because if the Supreme Court of the United States has extraordinary jurisdiction to grant certiorari in FELA cases and exercises it by granting certiorari in this cause at this time, surely that extraordinary jurisdiction would obligate the Supreme Court of the United States to review the whole case and review the correctness and justness of all its prior decisions, to the end that the law is properly applied to the facts and justice done.

ARGUMENT

This Petition Is A Motion For Rehearing

In Cause No. 187, October Term, 1956, styled *Deen vs. Gulf, Colorado and Santa Fe*, ... U.S. ....., 3 L.Ed. 105, 77 S.Ct. 111, the second and third "Questions Presented" were:

> "2. The second question presented is whether the Supreme Court of Texas has violated the mandate of the Supreme Court of the United States in failing to issue execution for costs, though twice requested, incurred by Deen in the Supreme

Court of the United States and awarded to him by judgment of that court.

"3. The third question presented is whether the Court of Civil Appeals of Texas, with the approval of The Supreme Court of Texas, has deprived Deen of the right of trial by jury given him by the Congress under the Federal Employers Liability Act by finding the verdict of the jury on damages and the judgment of the trial court rendered in conformity thereto excessive and in requiring Deen to file a remittitur of $5500.00."

The above quotations are from pages 8 and 9 of Deen's petition for certiorari in No. 187. On October 27, 1958, the Supreme Court of the United States denied certiorari in that cause. The questions presented by Deen in the present petition for certiorari (see petition for certiorari, page 6) are:

"1. The first question presented is whether The Supreme Court of Texas has deprived Deen of the right of trial by jury given him by the Congress under the Federal Employers Liability Act in affirming the action of the Court of Civil Appeals of Texas in reducing the damages awarded Deen by the jury and the trial court by $5500.00.

"2. The second question presented is whether Deen is entitled to interest on costs paid by him in the Supreme Court of the United States, where such costs were awarded him April 8, 1957, interest allowed thereon on remand by the Court of Civil Appeals of Texas, and Santa Fe has failed and refused to pay them."

It is true that Deen has not denoted the present

petition as one for rehearing, but it is not the name, it is the substance, and this is quite obviously a motion for a rehearing made and is in violation of and not in compliance with Rule 58 of the Supreme Court of the United States.

Remittitur

The power of jurisdiction of a court to reduce a jury verdict by remittitur is something that American Jurisprudence acquired from England. The requirement of such a remittitur does not deny the plaintiff a trial by jury. Among the many many cases which might be cited so holding are:

Arkansas Valley L. & C. Co. vs. Mann, 130 U.S. 69, 9 S.Ct. 458, 32 L.Ed. 854;

Southern Ry. vs. Bennett, 233 U.S. 80, 58 L.Ed. 860, 34 S.Ct. 566;

T. & P. Ry. Co. vs. Hill, 237 U.S. 208, 59 L.Ed. 918, 35 S.Ct. 575;

L. & N. R. Co. vs. Holloway, 246 U.S. 525, 529, 62 L.Ed. 867, 870, 38 S.Ct. 379, 381;

S.L. I.M. & S. Ry. Co. vs. J. T. Craft, 237 U.S. 648, 661, 59 L.Ed. 1160, 1165, 35 S.Ct. 704;

N. Y. Central and Hudson River R. Co. vs. Fraloff, 100 U.S. 24, 32, 25 L.Ed. 531, 534;

New York L.E. & W. R. Co. vs. Winter, 143 U.S. 60, 75, 36 L.Ed. 71, 80, 12 S.Ct. Rep. 356;

Herencia vs. Guzman, 219 U.S. 44, 55 L.Ed. 81, 31 S.Ct. Rep. 135.

For example, in *S.L. I.M. & S. Ry. Co. vs. Craft* (supra) there was an FELA trial court judgment for the plaintiff in the amount of $11,000.00, the state Supreme Court required a remittitur of $5,000.00, and the Supreme Court of the United States said (59 L.Ed. p. 1165):

> "* * * the power, and with it the duty and responsibility, of dealing with this matter, rested upon the courts below. It involves only a question of fact, and is not open to reconsideration here."

The foregoing list is not intended to be an exhaustive tabulation of the decisions of the Supreme Court of the United States, because we have been unable to find any case by the Supreme Court of the United States which held that where a court reduced the damages fixed by a jury by requiring a remittitur such action by such court was a "denial of the right of trial by jury." Deen's position apparently is that *Neese vs. Southern Ry. Co.*, 350 U.S. 77, 76 S.Ct. 131, 100 L.Ed. 60, is such a holding.

The *Neese* case does not justify such interpretation. The Supreme Court of the United States neither held nor said that the reduction of a jury verdict by remittitur was a "denial of the right of trial by jury." The *Neese* case was a jury verdict, in an FELA case, for $60,000.00. The trial court required a remittitur of $10,000.00, which was filed. The Circuit Court (216 F. 2d 772) held that the remittitur required by the trial court did not cure the excessiveness, and affirmed the judgment as to liability but "reversed for failure of the judge to set aside the verdict as to damages,

which is without support in the record even as to the amount to which it has been reduced, and the case will be remanded for a new trial confined to the issue of damages" (216 F. 2d 776). The case came to the Supreme Court of the United States by writ of certiorari which challenged the power of the Circuit Court of Appeals to enter the judgment above quoted under the Seventh Amendment to the United States Constitution. In a per curiam opinion the Supreme Court of the United States held:

> "We reverse the judgment of the Court of Appeals without reaching the constitutional challenge to that court's jurisdiction to review the denial by the trial court of a motion for a new trial on the ground that the verdict was excessive. Even assuming such appellate power to exist under the Seventh Amendment, we find that the Court of Appeals was not justified, on this record, in regarding the denial of a new trial, upon a remittitur of part of the verdict, as an abuse of discretion. For apart from that question, as we view the evidence we think that the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals."

Deen's position is that no matter what the rule be in other cases the *Neese* opinion held that in FELA cases a remittitur is a denial of the right of trial by jury. Admittedly Judge Smith in his dissenting opinion (317 S.W. 2d 913) was so persuaded. We quote from 317 S.W. 2d 915:

> "I think the Act does not contemplate an issue of excessive verdicts or the granting of a remit-

titur by the trial court or the Court of Civil Appeals. See Neese v. Southern Railway Company, 1955, 350 U.S. 77, 76 S.Ct. 131, 100 L.Ed. 60."

The Illinois court has so construed the *Neese* case. See *Pennell vs. B. & O. R. Co.*, 142 N.E. 2d 497.

The only possible basis for believing that the *Neese* case was intended by this Court to hold contrary to the settled rule that the requirement of a remittitur was not the denial of a jury trial, is that Federal Employers' Liability cases are an exception to all rules. That other plaintiffs in other civil damage suits are not denied the right of a trial by jury when a jury verdict is reduced by remittitur, but FELA plaintiffs are denied the right of trial by jury when a jury verdict in such case is reduced by a remittitur. The *Neese* case neither so said nor so held.

As indicated by the per curiam opinion of this Court in the *Neese* case, it carefully said that it did not reach the question of deciding whether or not the *Circuit Court* judgment reversing and remanding for a new trial on damages only was a violation of Article VII of the Federal Constitution. It merely said that it had examined the evidence and found that the *trial court's* order reducing the damages by $10,000.00 and entering judgment for $50,000.00 had support in the record. It has been argued that in the *Neese* case the Supreme Court of the United States held that *it* had the power to pass on excessiveness. The argument being that since it decided that the trial court's remittitur "was supported by the record" it decided that the judgment was not excessive, and that since the court

exercised the power to say it was not excessive it must have held that it had the power to say that the verdict was excessive. In other words, no court could have the power to say that a verdict was not excessive unless it had the power to say that the verdict was excessive. If that argument is correct and the Supreme Court of the United States now holds that it has the power to decide that a verdict is or is not excessive, then that of course is a holding which supports the right of the Circuit Court to do the same thing. and if the Seventh Amendment of the Constitution applies to state courts (which it does not, unless at least twenty decisions of the Supreme Court of the United States are overruled), such a holding would negative any claim that the requiring of a remittitur by a state trial court or a state appellate court was a denial of a trial by jury in an FELA case. There can be no possible basis for saying that when the Supreme Court of the United States decides that a jury verdict in an FELA case is or is not excessive it is not a "denial of trial by jury," but when a state court (trial or appellate) does the same thing, it is a "denial of trial by jury in an FELA case."

The construction of the *Neese* opinion by Deen, by the dissenting opinion by Associate Justice Smith in the Texas Supreme Court, and by the Illinois Court of Appeals, that the *Neese* case means that in FELA cases no court, trial or appellate, could require a remittitur in an FELA case, has no support in the opinion of the Supreme Court in the *Neese* case nor in the order entered in the *Neese* case. In the *Neese* case the jury brought in a verdict of $60,000.00, the trial court re-

quired a remittitur of $10,000.00, and entered judgment for $50,000.00. The Circuit Court reversed and required an entirely new trial on damages. The Circuit Court did not require an additional remittitur, and that question was not before the Supreme Court of the United States. Both the opinion and order of the Supreme Court of the United States in the *Neese* case affirmed the judgment of the trial court in requiring the $10,000.00 remittitur. How Deen's attorney, Justice Smith, or the Illinois Court of Appeals can construe the *Neese* opinion as holding that a remittitur is unconstitutional in an FELA case, we do not know. If a remittitur was a denial of a trial by jury, then the trial court of course had no power to require the remittitur, and the Supreme Court of the United States of course would have so held. Its affirmance of the requirement of a remittitur by the trial court is a recognition of the long standing and unquestioned rule that the requiremnt of a remittitur is not a denial of a right of trial by jury.

Let us interpolate here, the statement that if Deen was not denied the right of trial by jury, then of course the Supreme Court of the United States has no jurisdiction to grant certiorari, so this argument is directed both to the question of jurisdiction and on the merits, whch would affect the discretion of the Supreme Court of the United States to grant certiorari.

Now, we think the *Neese* case, like the many, many cases that preceded it, holds that the requirement of a remittitur is not the denial of a trial by jury. Cer-

tainly it establishes beyond argument that the denial of a trial by jury is not shown when the trial court reduces a jury verdict by requiring a remittitur. That leaves Deen with the one contention that when a *trial court* reduces a jury verdict by remittitur it is not a denial of a trial by jury, but when an appellate court, under a statute authorizing it to do so, does the same thing it is a denial of a trial by jury. To use an East Texas phrase, "That dog won't hunt." If a jury verdict in an FELA case is sacred, it is sacreligious for either a trial court or an appellate court to reduce it. To argue to the contrary would be to say that it is not error for a trial judge to instruct a verdict because there is "no evidence" but it is error for an appellate court in the same case to reverse and render because there is "no evidence."

The *Neese* case deliberately and particularly said in the opinion that the Supreme Court of the United States was not deciding the question of whether or not the Circuit Court of Appeals could pass on excessiveness. If the Court did not mean what it said and was holding that the trial court could pass on excessiveness but the Circuit Court could not, then its holding is merely a reiteration of many holdings by federal courts that, under the rules and statutes of the United States, the jurisdiction to require a remittitur is vested in the trial court and not in the Circuit Court. See page 17 of Deen's petition, wherein he quotes from *Texas Pacific-Missouri Pacific vs. Welsh* (Fifth Circuit) 179 F. 2d 880, and *Fairmount Glass Works vs. Cub Fork Coal Co.*, 287 U.S. 474, 77 L.Ed. 439, 53 S.Ct. 252. These cases and a host of others hold that

neither the Circuit Court nor the United States Supreme Court can pass on excessiveness under the Federal Rules of Civil Procedure. The only question ever raised is the argument that under the *Neese* case, as above shown, the Supreme Court of the United States did pass on the question of excessiveness by saying that the trial court's requirement of a remittitur and entering judgment for the balance was supported by the record.

We may be lengthening this unduly, because Deen has never presented any character of argument as to why the requirement of a remittitur by a trial court is not a denial of a trial by jury but the requirement of such a remittitur by an appellate court, where authorized to do so by rule or statute, is a denial of a trial by jury. Therefore, we will only briefly deal with this point.

Texas, like many other states, has a rule (formerly a statute) under which both the trial court and the Court of Civil Appeals has the power to require a remittitur. The present rules are *Texas Rules of Civil Procedure, Rules 328, 439 and 440.* These are attached to Deen's petition for certiorari in the appendix and are copied in the appendix to this brief. The Supreme Court of Texas in its opinion in this cause did not pass on the question of excessiveness, since it has no jurisdiction to do so. The Court of Civil Appeals has that jurisdiction under the Texas rules of practice, and the Supreme Court of Texas does not. The Court of Civil Appeals' authority to do so is identical with that of the trial court.

Beaumont S.L. & W. Ry. Co. vs. Schmidt, 123 Tex. 580, 72 S.W. 2d 899;
G.H. & S.A. Ry. Co. vs. Leifeste (Comm. App.) 22 S.W. 2d 1061;
Texas Pipe Line Co. vs. Hunt, 149 Tex. 33, 228 S.W. 2d 151;
Ford Motor Co. vs. Maddin, 124 Tex. 131, 76 S.W. 2d 474;
Wilson vs. Freeman, 108 Tex. 121, 185 S.W. 993;
I. & G.N. R. Co. vs. Goswick, 98 Tex. 477, 85 S.W. 785.

Some states vest exclusive jurisdiction to require a remittitur in the trial courts, others vest such authority in both the trial court and appellate court. For example, the following opinions are from a few of the states where the appellate court also has remittitur jurisdiction:

Simoneau vs. Pacific Electric Co.; 166 Cal. 264, 136 P. 544;
Hartford Life Ins. Co. vs. Baker, 127 Okla. 166, 260 P. 6;
Rathbun vs. Globe Indemnity Co., 107 Neb ....., 184 N.W. 903;
Kansas City, Southern R. Co. vs. Mixon-McClintock, 107 Ark. 48, 154 S.W. 205;
Doroszka vs. Lavine, 111 Conn. 575, 150 A. 692;
Lonergran vs. Small, 81 Kan. 48, 105 P. 27;
Sawyer vs. Rumford Falls Paper Co., 90 Me. 354, 38 A. 318;

Y. & M. Valley R. Co. vs. Scott, 108 Miss. 871, 67 So. 491;

Hurst vs. C. B. & Q. R. Co., 280 Mo. 566, 219 S.W. 566;

Yergy vs. Helena Light & R. Co., 39 Mont. 213, 102 P. 310;

Knock vs. T. & G. Ry. Co., 38 Nev. 143, 145 P. 939;

Mimms vs. Bennett, 160 S.C. 339, 150 S.E. 124;

Lewisburg & N. R. Co. vs. Hinds, 134 Tenn. 293, 183 S.W. 985.

There are states where there is a constitutional or statutory provision which limits the right to require a remittitur to the trial court. For example, see *Vanlon vs. Schneiderman* (Ore.), 210 P. 2d 461, and *Irvine vs. Gibson*, 117 Ky. 306, 77 S.W. 1106.

Deen has presented no authority, except the *Neese* case and Judge Smith's dissenting opinion in this case, that the requirement of a remittitur by either a trial court or an appellate court is a "denial of the right of trial by jury" in either FELA cases or in any other case. If it is not the denial of a trial by jury, then this Court has no jurisdiction, no federal right has been invaded, and certainly the Court of Civil Appeals committed no error in doing so. If the Court of Civil Appeals committed no error in requiring a remittitur, there could hardly be an error by the Supreme Court of Texas (which has no jurisdiction under the Texas Constitution to pass on remittiturs) in not reversing the opinion of such Court of Civil Appeals.

The Remittitur Required By The Court of Civil Appeals Was Supported By The Record

The opinion of the Court of Civil Appeals in which a remittitur was required is *G.C. & S.F. Ry. Co. vs. Deen*, 306 S.W. 2d 171.

This Court, in the *Neese* case (supra), said:

> "For apart from that question, as we view the evidence we think that the action of the trial court *was not without support in the record*, and accordingly that its action should not have been disturbed by the Court of Appeals." (Italics ours.)

If that means that the Supreme Court of the United States will in each FELA case determine whether or not the remittitur required is or is not supported by the record, then certainly the remittitur in this case meets that test. Deen, in his peition for certiorari (see pages 12 and 13), purports to be confused and not know whether the Court of Civil Appeals required a remittitur to cut the *judgment* from $21,450.00 to $15,950.00 or whether it cut the verdict from $39,000.00 to $33,500.00. This is a mere attempt to confuse the situation, since Deen's attorneys are not in any such quandry. The jury verdict (see record in *Deen vs. G.C. & S.F.*, No. 199 October Term, 1956, pages 154 and 155) was as follows:

"SPECIAL ISSUE NO. 17:

> "What amount of money, if any, if paid now in cash, do you find from a preponderance of the evidence, will fairly and reasonably compensate the Plaintiff for the injuries, if any, sustained by

him on July 12, 1949, on the occasion in question?
"Answer in Dollars and cents, if any or none.
"Answer: $39,000."

* * *

"SPECIAL ISSUE NO. 18:

"What sum of money do you find from a preponderance of the evidence, should the recovery you have allowed herein (if you have allowed any) be reduced by reason of such negligence, if any, of the plaintiff?
"Answer in dollars and cents, if any, or none.
"Answer: $17,550 (45%)."

Deen's attorneys' confusion in the petition for certiorari in this cause is certainly not justified. Simple mathematics would show that if you deduct $5,500.00 from $39,000.00 and then deduct from that $17,550.00 you get exactly the same answer as though you deduct $5,500:00 from $21,450.00. Deen's attorneys' present confusion did not exist when they filed the remittitur in the Court of Civil Appeals (see such remittitur, which Deen has forwarded to the Supreme Court of the United States as No. 5). The confusion did not exist when they filed application for writ of error to the Texas Supreme Court (see such application, page 4, a certified copy of which is Item 9 on Deen's list). The confusion did not exist when Deen's counsel filed motion for leave to file petition for mandamus (No. 133-Miscellaneous). See that motion, pages 4-11. Nor is their statement (petition in this case, page 13), to the effect that the Santa Fe was happy with the remittitur and had not asked for a greater remittitur, true. See the Santa Fe's brief in the Court of Civil Appeals,

Argument under Seventeenth Point, page 99, wherein the assignment read:

> "The error of the Court in entering judgment for the sum of $21,450.00, for the reason that same was excessive by at least $11,450.00.'"

Now, if the Supreme Court of the United States reaches the question of whether or not the Court of Civil Appeals' reduction was "without support in the record," we offer the following (the references are to the record in No. 199, October Term, 1956, which is the same record to which Deen has referred in his petition):

There is no issue but that the plaintiff sustained a broken leg, both the bones were broken, and it had to be set with silver screws and the plaintiff was in a cast for three or four months and had a built-up shoe for several months more. (See testimony of Dr. E. F. Cadenhead, Dr. William Branch, S.F. p. 29-52) But there is likewise no question but that the breaks healed and the plaintiff had a good straight leg. (See testimony of Dr. Branch, S.F. pp. 49-50). We may concede that the plaintiff had some pain and suffering and that he perhaps does his work with less ease (at least, in climbing ladders) than he did before. On the other hand, it is undisputed that the plaintiff was only off the job about 10 months and that his actual out-of-pocket loss for that length of time was $2,350.00 for that period. It is further undisputed that he had worked for four years steadly at a higher rate of pay than he had before.

We quote from Deen's testimony, beginning at Page 53:

"Q. Well, in other words, you are getting more now; you are, to boil it down, getting about fifty per cent more now than you were getting at the time you got hurt—or rather you are getting about fifty cents an hour more now than you were when you got hurt?

"A. Yes, sir.

"Q. They have not cut your wages because you got hurt, have they?

"A. No, sir.

"Q. You haven't been demoted, have you?

"A. No.

"Q. You are still at the same job that you had before?

"A. Yes, sir, with the exception of five days a week instead of seven days a week.

"Q. Well, that didn't have anything to do with your injury, did it?

"A. No, sir, but—

"Q. Your working only five days a week instead of seven?

"A. No, sir it didn't, but it has a right smart to do with your take home pay when its summed up.

"Q. What I am getting at, if you had not got your leg hurt, you would still be working just five days a week, wouldn't you, Mr. Deen?

"A. Yes, sir.

"Q. As a matter of fact, the last year or two they have gone almost wholly to diesels and you don't have quite as much work to do out there as a coppersmith; is that right?

"A. That's right.

"Q. Now, Earl, you were off—you don't mind if I call you Earl, do you?

"A. Thats fine; I rather you would.

"Q. You were off from July 12, 1949, until April 3, 1950; is that correct?

"A. Yes, sir.

"Q. Did you know how much your wages would have been if you had been working during that time?

"A. I know how much the man drawed that worked my job.

"Q. All right, then, if you had received the same amount he did—how much did he draw?

"A. He received $2,781.19. He earned that.

"Q. Beg your pardon?

"A. He earned that; he didn't get all of that, as there was withholdings of different types.

"Q. In other words, it would have been somewhere around twenty-seven hundred or less that he actually got?

"A. His take home pay would have been something less, or around twenty-five hundred, I would say.

"Q. All right. But during that time you did get some hundred and forty dollars from—

"A. I got $144.00.

"Q. Actually your out of pocket was somewhere in the neighborhood of $2,250.00?

"A. Yes, sir.

"Q. I miscalculated that, Earl, it would be $2,350. Mr. Holloway says it would have been $2,350.00; I didn't mean to shortpot you; it is $2,350.00. Is that right?

"A. Yes, sir.

"Q. All right, now, April 3, 1950, is when you

went back to work?

"A. Yes, sir.

"Q. And this past April 3, 1954, was four years later?

"A. Yes, sir.

"Q. During that time, Earl, isn't it a fact that you worked pretty darned steady?

"A. Yes, sir.

"Q. As a matter of fact, during that time four years, other than your regular vacations—your regular off days—you had less than thirty days during the four years that you have been off the job?

"A. I am sure of that.

"Q. And during that time you have drawn some—well, let me ask you this: how much overtime have you drawn during that four years?

"A. Not much.

"Q. In other words, you have not drawn as much overtime as you have off time, or would you say you have? I think you have, but I want to ask you?

"A. I don't believe I have; I haven't even thought about it.

"Q. But you have drawn overtime, haven't you?

"A. Yes, sir.

"Q. And have you been drawing fifty cents a week more than when you were working—fifty cents an hour more than you were working for at the time and before you got hurt?

"A. Yes, sir.

"Q. All right, now, when you first came back to work, you said that you had some difficulty and couldn't do anything but light work; is that

correct?

"A. That's right.

"Q. How long was it after you came back to work before you began to feel like doing your regular job out there?

"A. Well, the steam engines went out of service about as fast as I got to feeling where I could navigate all on my own power normally.

"Q. Now, getting back, if you will; you went back to work on April 3, 1950, and at the end of about six months working were you back doing pretty well your regular job?

"A. No, sir.

"Q. All right. When you had been back working a year after you went back to work April 3, 1950, a year from that date, by April 3, 1951, were you back doing about your normal work out there?

"A. I was trying to.

"Q. And you weren't getting any complaint from your boss, were you, about the work you were doing?

"A. No, sir.

"Q. As far as your boss is concerned, your work has been satisfactory since you went back to work, has it Earl?

"A. As far as I know.

"Q. He has not complained to you about it, has he?

"A. Very little.

"Q. Well, nobody ever gets by without a little complaint do they?

"A. That's right."

Under the foregoing record, there is no basis for any lost wages except the $2,350.00. There is like-

wise no basis for saying that his earning capacity is diminished in the future because he is doing exactly the same work he was doing before, it was shown that it is being satisfactorily done as far as his employer is concerned, and he is getting more pay for it than he did before he was hurt. That means, in effect, that the jury allowed him more than $35,000.00 for pain and suffering.

There is a series of annotations in A. L. R. which collect the various verdicts, classifying them by injury and show the amounts held excessive and not excessive. The Court will notice that there is a classification for broken ankles and a classification for broken legs. These annotations may be found by referring to 15 *Am. Jur.* 636; 46 *A. L. R.* 1244; 102 *A. L. R.* 1143; and 16 *A. L. R.* (2) 3.

Having checked these, we will unequivocally state that no verdict in any comparable case in excess of $10,000.00 has ever been allowed to stand. $39,000.00 is so obviously and apparently excessive under the record here, that we don't think any extensive argument is required. In addition to the A. L. R. annotations and to illustrate the type of cases where verdicts have been held excessive, and in addition to the Webb Case above cited, we respectfully refer the Court to the following: *Tri-County Electric Coop. vs. Clair* (N.R.E.) 217 S.W. (2) 681; *Dallas vs. Hutchins* (N.R.E.) 226 S.W. (2) 155; *Fidelity U. L. Ins. Co. vs. McGinnis* (Civ. App.) 62 S.W. (2) 186; *K. C. S. Ry. Co. vs. Diggs* (Ark.) 167 S.W. (2) 879; *La Posta vs. Hummers* (Pa.) 55 Atlantic (2) 751; *Davis*

vs. Buck Stove Co. (Mo.) 49 S.W. (2) 47; *Gackstetter vs. M. S. R. Co.* (Cal.) 52 P. (2) 998; and *Morris vs. Atlas Portland Cement Co.* (Mo.) 19 S.W. (2) 865.

Certainly, if Deen advocates the test "whether the requirement of the remittitur was supported by the record," the record in this case shows that the Court of Civil Appeals' reduction was so small compared to the excessiveness that no right-thinking man could claim that there was no support in the record for such reduction.

Court Costs

Deen's second "Question Presented" is based solely on the proposition that the Supreme Court of Texas did not allow interest on the costs allowed by the Supreme Court of the United States in cause No. 199, October Term, 1956, *Deen vs. G.C. & S.F.* 353 U.S. 925, 77 S.Ct. 715, 1 L.Ed. 2d 718.

We do not see how Deen can claim that the Supreme Court of Texas committed any error in not revising the judgment of the Supreme Court of the United States to allow interest on such costs. His general position throughout this case has been that the Supreme Court of Texas could not touch the judgment of the Supreme Court of the United States, and in effect that is what he persuaded the Supreme Court of the United States to hold in *Deen vs. Hickman*. His position is that the Supreme Court of Texas cannot change any judgment by the Supreme Court of the United States, *except* that it can add interest to the

court costs. The absurdity of that position is its own answer.

We would put no more time on this except for the fact that Deen's attorneys have made a number of statements in their argument on costs that are entirely contrary to the record. We refer to the petition for certiorari in this cause, pages 7, 18 and 19. Deen's attorneys have always elected to ask the Court of Civil Appeals at Eastland, or the Supreme Court of Texas, to get out execution for costs with interest. Deen made his first demand for execution in the Court of Civil Appeals, and the Santa Fe then replied (see Item 13 in the record in No. 187, October Term, 1957, *Deen vs. Santa Fe*) that it admitted it owed the costs. The Santa Fe took the same position when Deen made the same demand in the Supreme Court of Texas, at which time he was advised by the clerk of that Court (March 17, 1958) that under the *Texas Rules of Civil Procedure* 149, 486, 447, 502 and 511, execution for costs would issue when the appeal was finally disposed of. The judgment of the Supreme Court of Texas in the present cause, but for this petition for certiorari, would have finally disposed of it.

Now, as to interest on costs, Deen's statement in the petition for certiorari in this cause that interest is uniformly allowed on costs by Texas and federal courts is not true. See, for example, *Janes vs. Busby* (Tex. Civ. App.) 93 S.W. 2d 788, and *Peoples Bank vs. Aetna Ins. Co.*, 76 F. 548.

There is no rule cited by Deen to the effect that costs in the United States Supreme Court bear inter-

est, nor did the order of this Court so require. Certainly it is not error for the Supreme Court of Texas to leave that question as the Supreme Court of the United States left it. If Deen's petition for certiorari is not a complaint as to what the Supreme Court of Texas did, then it is a motion for rehearing in Cause No. 199, October Term, 1956, *Deen vs. G.C. & S.F.*, asking the Supreme Court of the United States to amend its judgment to provide for interest on the costs.

SUMMARY

Jurisdiction

Jurisdiction is denied. First, because the same points and the same issues presented by this petition for certiorari were presented in No. 187, October Term, 1957, and certiorari was denied in that cause on October 27, 1958. Secondly, the requirement of a remittitur is not "the denial of a trial by jury in an FELA case," whether it be a remittitur required by the trial court or one required by an appellate court which has statutory authority similar to that of the trial court to require a remittitur. Third, the remittitur as required by the Court of Civil Appeals was well supported in the record. Lastly, Deen has been denied no federal right, nor is any substantial federal question involved.

Argument

I. From the beginning of Anglo-American jurisprudence, the requirement of a remittitur has been

held not to be the denial of a trial by jury. Under the statutes and rules applicable to federal courts, and in a few state courts, the jurisdiction to require such a remittitur is vested solely in the trial court. In most states, including Texas, both the trial court and an appellate court are given the jurisdiction to require remittitur. If Deen had elected to file this suit in the federal court and the trial court had required the remittitur, no federal right would be involved. If he elects to file the suit in a state court, where the right to require remittitur is vested in both the trial court and in the Court of Civil Appeals, the requirement of a remittitur by either court is not the denial of any federal right. Surely we have not reached the point where the states must rearrange the jurisdiction of their courts in FELA cases.

II. The remittitur as required by the Court of Civil Appeals was supported by the record. If the Supreme Court of the United States has jurisdiction to review the requirement of a remittitur in all cases or in all FELA cases, then in this case the reduction of the trial court's judgment from $21,450.00 to $15,950.00 is amply supported by the record and certainly does not justify the granting of certiorari to determine whether that court exercised the judicial discretion delegated to it by the Texas Constitution with absolute exactness. If a state court (trial or appellate) has jurisdiction to require remittitur in any FELA case, then the exercise of the judicial discretion incident thereto is not a subject matter for certiorari unless there is a clear abuse, which does not exist here.

III. Deen claims that the Supreme Court of Texas should have added interest at the rate of 6% to the costs in the United States Supreme Court, which were taxed against the Santa Fe. The Santa Fe's position is that the Supreme Court of Texas had no more authority to add interest to the costs taxed by the Supreme Court of the United States than it would have had to strike interest on the same costs had the Supreme Court of the United States allowed such interest. If this is an attempt to have the Supreme Court of the United States amend its judgment in *Deen vs. Santa Fe*, 353 U.S. 925, 77 S.Ct. 715, 1 L.Ed. 2d 718, then it is a motion for rehearing which comes too late under Rule 58.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied or dismissed. If the petition for certiorari be granted, the respondent's prayer is that all matters decided in all of the various appeals to this Court be re-opened, so that all matters might be re-presented and re-argued and this Court could review the whole case and enter a just and final judgment on all points as required by the law and the facts.

Respectfully submitted,

McLEOD, MILLS, SHIRLEY & ALEXANDER
801 Santa Fe Building
Galveston, Texas
HUDSON, KELTNER & SARSGARD
1313 Continental Life Building
Fort Worth 2, Texas
Attorneys for the Respondent, Gulf, Colorado and Santa Fe Railway Company

Of Counsel:

1313 Continental Life Building
Fort Worth 2, Texas

I certify that a copy of the foregoing respondent's reply to the petition for writ of certiorari has been mailed on the ..... day of ....., 1959, to petitioner's attorney, Robert Lee Guthrie, 1410 Republic National Bank Building, Dallas 1, Texas.

.....
Luther Hudson

APPENDIX

Texas Rules of Civil Procedure

RULE 328. IF NOT EQUITABLE

New trials may be granted when the damages are manifestly too small or too large, provided that whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal in said action, then the party remitting shall not be barred from contending in the appellate court that said remittitur should not have been required either in whole or in part, and if the appellate court sustains such contention it shall render such judgment as the trial court should have rendered without respect to said remittitur.

Source: Art. 2235.

Change: Addition of all wording after the first comma.

RULE 439. REMITTITUR

If, in any judgment rendered in the district or county court, there shall be an excess of damages allowed, and before the plaintiff has entered a release of same in such court, in the manner provided by these rules, such judgment shall be removed to the Court of Civil Appeals, it shall be lawful for the party in whose favor such excess of damages has been rendered to make such remittitur in the Court of Civil Appeals in the same manner as such release is required to be made in the district or county court. Upon such release being filed in said court, after

revising said judgment, said Court of Civil Appeals shall proceed to give such judgment as the court below ought to have given if the release had been filed therein.

Source: Art. 1861, unchanged.

RULE 440. SUGGESTION OF REMITTITUR

In civil cases appealed to a Court of Civil Appeals, if such court is of the opinion that the verdict and judgment of the trial court is excessive and that said cause should be reversed for that reason only, then said appellate court shall indicate to such party, or his attorney, within what time he may file a remittitur of such excess. If such remittitur is so filed, then the court shall reform and affirm such judgment in accordance therewith; if not filed as indicated then the judgment shall be reversed.

Source; Art. 1862, with minor textual change.